

Monitoring and enforcement of environmental provisions in the EU-UK future relationship: three key priorities

July 2020

Summary

The EU and the UK have commenced negotiations about the nature and content of their future relationship. This agreement could cover and influence a broad range of policy matters that extend beyond trade, including environmental protection. As such, these negotiations are an important and unique opportunity to agree necessarily ambitious environmental co-operation measures.

The future relationship agreement will not address all environmental issues faced by the EU and the UK. However, for any environment-related provisions to have a meaningful impact, they must be supported by well-designed oversight mechanisms which break new ground in ensuring accountability and bolstering environmental governance.

These mechanisms must enable both sides to co-operate transparently, engage both parties and their respective civil societies in monitoring compliance with the agreement, and offer robust means of enforcement. They should bolster the achievement of environmental ambition and the rule of environmental law internationally and domestically. This means that the future relationship must incorporate provisions that deliver the following key priorities:

- Mechanisms must be **participatory, transparent and timely** – with a full role for civil society, through the provision of readily available information, meaningful monitoring mechanisms and a public complaints procedure. Processes should also be responsive and subject to appropriate time limits.
- Decisions must be **fair, independent and expert** – oversight mechanisms must be administered, overseen and conducted by independent adjudicators and experts, and challenges to alleged non-compliance dealt with fairly.
- Remedies must be **effective and dissuasive** – allowing for sanctions and remedies that put the environment first.

Background

The future relationship agreement will be a landmark constitutional agreement that may govern EU-UK relations for years to come. Owing to its significance and its special nature, there is a real need to consider its broader implications for people and the environment and to ensure it is ambitious, progressive and robust.

Some environmental measures will be necessary in the final agreement to facilitate an economic partnership. For instance, in its draft text of the agreement (the 'EU Draft Text'), the EU has built in 'level playing field' provisions intended to encourage "an environment of open and fair competition...in a manner that is conducive to sustainable development".¹ Likewise, the UK's draft negotiating document (the 'UK Draft Text') includes a Trade and Environment Chapter that acknowledges "enhanced cooperation to protect and conserve the environment brings benefits that will... complement the objectives of this Agreement."²

The agreement should also be used to make and reaffirm commitments to environmental co-operation and make clear the parties' values and priorities. It must reflect the EU and the UK's shared environmental goals and their geographical proximity. It must be consistent with ambitious environmental objectives and encourage a shift to greener governance within both the EU and the UK.

To ensure these commitments have the real-world impact of improving our environment, the text must also provide for the establishment of methods to:

- Monitor both parties' implementation of environmental commitments to ensure they comply with their obligations.
- Allow people and governments to complain if they find evidence that commitments are not being met in order to avoid environmental damage.
- Ensure that sanctions are put in place to encourage a shift towards compliance, and when aspirations are not met, governments are supported to take the required action.

Reflecting its special and novel nature, as well as the criticality of its environmental protection provisions, the future relationship should take a new approach to monitoring and enforcing commitments, ensuring that all environmental provisions are subject to a mechanism that is capable of providing proper oversight and driving environmental improvement.

Analysis of the draft texts: dispute settlement mechanisms

The **EU Draft Text** establishes different dispute settlement mechanisms for different environmental provisions. Certain sections of the Level Playing Field and Sustainability ('LPFS') Title³ are subject to the main dispute settlement mechanism (the 'EU Horizontal DSM')⁴ which applies to the majority of the overall text. For instance, this applies to disputes relating to the non-regression and progression commitments.

But other environmental provisions are subject to different mechanisms:

- Section 8 of the LPFS Title, which contains provisions relating to implementation of Multilateral Environmental Agreements ('MEAs') has its own bespoke, but far weaker, dispute resolution mechanism (the 'Section 8 DRM').⁵
- Title V on Fisheries allows for tariff concessions to be suspended if a party considers that the other has breached certain fisheries-related obligations, though does not include any more general oversight mechanisms.⁶

The **UK Draft Text** also establishes a horizontal dispute settlement mechanism (the 'UK Horizontal DSM'). This is potentially powerful: matters can be heard by a Panel of Arbitrators that can issue a final report. In response to this, a party in breach must take "any measure necessary to comply promptly".⁷ The Arbitrators' findings are "final and binding... They shall be unconditionally accepted by the Parties."⁸ There is also the potential for robust remedies in the event of continuing non-compliance.

The Trade and Sustainable Development Chapter is subject to the UK Horizontal DSM. However, this is of limited value given the Chapter contains few enforceable obligations (favouring instead vague recognitions and promotions).

By contrast, commitments in the Trade & Environment Chapter are not subject to the Horizontal DSM, and are only covered by weak provisions that enable consultation and reference to a Panel of Experts (the 'Trade & Environment Procedure').⁹

Below, Greener UK sets out **three key priorities** that an effective monitoring and dispute settlement mechanism must embed and evaluates the two Draft Texts' approaches against these.

1: Oversight mechanisms must be participatory, transparent and timely

Civil society must be empowered to assess, review and improve the environmental implications of the future relationship and both parties' implementation of the environmental provisions. Civil society has a key role to play in raising concerns where a party is falling short of its obligations.

Doing this meaningfully will need innovation and leadership. Civil society input must be respected, responded to and acted upon. The purpose of and route for civil society participation must be specifically clarified;¹⁰ the functions of this participation deepened; and its influence strengthened.¹¹

A meaningful system of public participation is dependent on transparent, consistent and prompt reporting of parties' actions to implement relevant environmental measures. But it must also provide formal and accessible mechanisms for ongoing civil society input. These mechanisms must be effective and well-functioning: they must actually have an impact on the agreement and its implementation.

Deploying functioning engagement may require the EU and the UK to provide funding and technical resources and to build capacity to support meaningful participation.¹² And, in addition to civil society-specific forums, public participation should be encouraged and supported in any other governance mechanisms created by the agreement. This would help to integrate civil society input across all areas of the future relationship's policy and implementation.¹³

Civil society must also be empowered to seek resolution to non-compliance through a reliable public complaints system that provides a route to improving compliance. Relying exclusively on a state-to-state dispute settlement mechanism will likely be ineffective as there is very little incentive for parties to launch proceedings against agreement partners in relation to environmental failings.¹⁴ Given this, the inclusion of a public complaints mechanism in the future relationship is paramount.

The provision of a mechanism for members of the public to raise issues of alleged non-compliance with international law is not novel. In the human rights context, for instance, individuals are empowered to bring claims relating to alleged violations of their rights as protected in the core human rights treaties. The UN notes that it is through individual complaints that these rights "are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect."¹⁵ This is equally applicable to and important for environmental rules and protections. The provisions in the future relationship agreement will be of direct interest to individuals and civil society organisations. These matters matter to people. This must be recognised and reflected through the creation of a means for the public to raise issues about compliance.

This complaint mechanism must not simply be a post-box: it must be connected into a powerful enforcement mechanism. It could be linked into the general dispute settlement procedure. An alternative would be for the body receiving and dealing with complaints to make binding decisions incorporating recommendations (including from other relevant environmental bodies) that the parties must implement.¹⁶

The process for submitting complaints must be open, straightforward and transparent. It should not require the complainant to fulfil certain criteria. Substantiated allegations should be properly investigated and escalated where necessary, and the investigation phase must be iterative, allowing ongoing participation by complainants. Complaint handling must be subject to time limits; incorporate robust rights to be heard and require the publication of formal decisions backed up by fully substantiated reasoning by the body dealing with complaints.

EU Draft Text: role for civil society

The EU Draft Text includes some relatively brief provisions on the role of civil society through domestic advisory groups and a civil society forum.¹⁷ However, these provisions are weak and vague. They do not create obligations on the parties or the Partnership Council to meaningfully engage with the domestic advisory groups or civil society forum.

We welcome the European Parliament's recommendation on the future relationship,¹⁸ which highlights the importance of civil society dialogue, stakeholder involvement and consultation by both parties.¹⁹

EU Draft Text: public complaints mechanism

The EU Draft Text does not establish a mechanism for the submission of public complaints regarding the parties' compliance with the terms of the agreement. There are obligations to establish domestic processes (e.g. a watchdog) that enable the public to challenge non-compliance with certain specified matters of environmental law.²⁰ While useful, this does not obviate the need for civil society to be able to make complaints about non-compliance with the treaty directly.

UK Draft Text: role for civil society

The UK Draft Text fails to establish adequate procedures giving people and civil society meaningful opportunities for engagement. Civil society organisation engagement is limited to the ability to feed into consultative mechanisms both domestically²¹ and through annual joint Civil Society Forum sessions.²² In addition, a Committee on Trade and Sustainable Development tasked with overseeing implementation of the Trade and Environment Chapter can engage with the Civil Society Forum²³ and can seek advice from the Parties' civil society organisations in the context of ongoing (dispute-related) consultations – although it is not required to carry out such actions.²⁴

However, these processes are lacking and fail to deliver. The domestic consultative mechanisms appear to carry no weight: there is no requirement for the Parties to implement, respond to or even merely consider any opinions or recommendations submitted by the representatives. The Civil Society Forum's purpose is vague ("to conduct a dialogue on sustainable development aspects of this Agreement"²⁵) and there are no assurances about the impact of the forum's dialogues or how adequate resourcing of it will be ensured.

Finally, the TSD Committee's role is undermined. Whilst it is required to present the views of the forum to the Parties directly,²⁶ there is no requirement for the Parties to then engage with or respond to these views. In addition, an attempt at transparency ("any decision or report of the Committee on Trade and Sustainable Development shall be made public...") is completely undermined by making such steps optional ("...unless it decides otherwise").²⁷

UK Draft Text: public complaints mechanism

The UK Draft Text does require the Parties to receive and consider public submissions about matters related to the Trade & Environment Chapter, including its implementation.²⁸ This is encouraging and has some value. But there is room for improvement. The submissions should be made not to the Parties themselves but to an independent – ideally supranational – body established with receipt, consideration and management of such complaints as part of its core functions. As noted above, complaints should be thoroughly investigated and, if substantiated, escalated to a meaningful dispute settlement procedure.

The UK Draft Text also contains provisions relating to public awareness and domestic enforcement of environmental law.²⁹ While some of the wording here is of merit and reflecting them through domestic processes may help to improve the UK's compliance the Aarhus Convention, the actual obligations on the Parties remain weak – they are not themselves enforceable and any issues raised regarding compliance with them would be subject only to the disappointing Trade & Environment Procedure.

2: Fair, independent and expert adjudicators

Complaints, oversight and dispute settlement will require the creation of at least one new institution. To ensure fair and unbiased decision-making and treatment of issues, it must be free from political influence by the UK, the EU, or any other jurisdiction. It must also be sufficiently resourced and appropriately staffed to be able to carry out its duties effectively.

This institution must include a pool of independent and impartial adjudicators who hear disputes. As a minimum, they must decide matters “impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”.³⁰ Moreover, the nomination and selection of these adjudicators must be based on objective criteria. The body responsible for appointment must be charged with guaranteeing independence.

In addition, the adjudicators must have broad and demonstrable expertise across a range of environmental issues that could be encountered in a dispute. Their expertise must include environmental law, ecological humanities and a range of scientific and technical disciplines. The specific adjudicators considering a dispute should be selected in order to enable thorough assessment of the specific matter. In addition to this, it may be helpful for the dispute settlement forum to develop linkages with the bodies established to oversee and enforce MEAs – particularly where matters concern the proper implementation of MEAs themselves.

EU Draft Text: independent, expert adjudicators

The EU Draft Text requires that the arbitration tribunal (which comprises part of the EU Horizontal DSM) “shall only comprise persons whose independence is beyond doubt”.³¹ In addition, the panel of experts under the Section 8 DRM “shall act independently”.^{32 33}

The EU Horizontal DSM requires that potential arbitrators must have “expertise in specific sectors covered by this Agreement or its supplementing agreements...”,³⁴ and the individuals on the Section 8 DRM panel of experts shall have “specialised knowledge of or expertise in...environmental law, issues addressed in this Section, or the resolution of disputes arising under international agreements...”.³⁵ In addition, the Section 8 DRM procedure enables parties to seek the views of the domestic advisory group or other expert advice at the consultation stage.³⁶

EU Draft Text: links with MEAs

Both the EU Horizontal DSM and the Section 8 DRM make reference to the existence of other agreements with similar content and related expertise.^{37,38} However, neither develops sufficiently strong linkages with them or ensures that such expertise will make a substantive difference to dispute settlement under the FTA.

UK Draft Text: independent, expert adjudicators

The UK Draft Text requires that experts proposed as panellists must have “specialised knowledge or expertise in environmental law, issues addressed in this Chapter or in the resolution of disputes arising under international agreements.”³⁹

They will be chosen for their “objectivity, reliability and sound judgement” and must be “independent, serve in their individual capacities and not take instruction from any organisation or government with regard to the matter in issue.”⁴⁰ Whilst the thrust of these provisions is generally to be welcomed, the precise wording could be strengthened to better guarantee panellist independence and impartiality.

Whilst there is scope for civil society organisations to provide advice at the consultation phase (when requested by the TSD Committee), there is apparently no opportunity for civil society to contribute to or be engaged in the Panel of Experts procedure prior to the delivery of the Experts’ report.

UK Draft Text: links with MEAs

The Panel of Experts established as part of the Trade & Environment Procedure “should seek views and information from relevant bodies” established under multilateral environmental agreements in respect of any matters related to such agreements.⁴¹ In exercising this, the Panel of Experts must give materials received from other bodies appropriate consideration and weight.

3: Dissuasive and effective sanctions

Enforcement procedures must incentivise and facilitate the EU and the UK’s improvement of their own environmental law as well as discouraging non-compliance with the agreement’s provisions.

In the context of the climate and ecological crises our planet faces, dispute settlement mechanisms should reinforce and underpin commitments the parties have made in other international agreements – these will be some of the most important obligations in the EU-UK agreement. As such, they should be backed up by appropriate and adequate sanctions rather than undermined by an unjustifiably weak mechanism.

Failure to comply with a ruling following the dispute settlement process should give rise to hard-edged measures, such as:

- suspension of trade benefits;
- suspension of other rights and duties within the future relationship agreement as well as any supplementary agreement; and / or
- financial penalties.

Financial penalties should be available for serious and unremedied breaches. And they should be designed to protect interests beyond just economic. Any fines levied should be used in specific ways designed to improve environmental performance, awareness and capacity. The imposition of fines must not be contingent on a party having to demonstrate ‘nullification and impairment’ of the agreement’s economic benefits for that party.⁴²

The threat of meaningful sanctions via a hard-edged approach to enforcement and fines in the current EU system is well-known as a driver for compelling compliance with environmental law. In the labour standards context, a meta-analysis found that “the credible threat of legal action (and ultimately sanctions) can lead to progress being made on labour issues in trade partners who would otherwise be reluctant to engage...”.⁵⁰

It is not always necessary for parties to actually enter into dispute settlement proceedings for these mechanisms to be effective. Simply the existence of a robust penalties regime would help to give the environmental provisions of the future relationship real bite, encouraging compliance.

EU Draft Text: remedies

The EU Horizontal DSM enables the arbitration tribunal to “impose a lump sum or penalty payment to be paid by the respondent to the complainant”.⁴³ In addition, there is scope for the complaining party to temporarily suspend its obligations under the agreement if the respondent party fails to pay such a payment or – after a certain period of time – persists in failing to comply with the tribunal’s ruling.

The Section 8 DRM does not include any direct references to remedies or sanctions of the type set out in the EU Horizontal DSM – though the EU Draft Text is somewhat unclear on this.⁴⁴ At the very least, the Parties are required to discuss appropriate measures and follow-up steps taken will be monitored by the Specialised Committee on the LPFS.⁴⁵ This approach to ensuring compliance is inadequate and must be improved.

We welcome the European Parliament’s recommendation that “the dispute resolution mechanism will need to be robust and should provide for gradual sanctions as well as remedies...and that such a mechanism will need to ensure effective, rapidly actionable and dissuasive remedies”.⁴⁶

UK Draft Text: remedies

Under the UK Horizontal DSM, a breaching party shall “take any measure necessary to comply promptly” with the Arbitrators’ final report.⁴⁷ If it fails to do, it can be required to enter into consultations to agree a compensation payment or other alternative arrangement if it fails to remedy the breach. In some circumstances, the complaining party is entitled to temporarily suspend the application of trade concessions or other obligations.⁴⁸ These mechanisms and the potential remedies reinforce the provisions they relate to and act as a deterrent against non-compliance.

However, the Trade & Environment Procedure carries no such strength. A Panel of Experts’ report is not binding. Instead, Parties are required to engage in discussions, taking the report into account and endeavouring to identify a measure or an action plan to remedy the issue.⁴⁹ The TSD Committee is tasked with monitoring the follow-up to a Panel’s report but there is no real strength to this and no mechanism for enforcing the Panel’s findings. This undermines the environmental provisions in the UK Draft Text. It risks making non-compliance much more palatable than if they were subject to proper dispute settlement mechanisms.

Conclusion

The monitoring and enforcement mechanisms included in the EU-UK future relationship are important. Their design, culture and practical efficacy will either reinforce or undermine the parties’ commitments on environmental – as well as other – matters. In order to really strengthen the parties’ promises and encourage compliance with them, it is vital that the monitoring and enforcement mechanisms:

- are **participatory, transparent and timely** – the draft texts could both be amended to:
 - include stronger, clearer provisions on the role of civil society;
 - add specific obligations on proposed governance mechanisms to engage publicly and embed transparency;
 - establish supranational public complaints mechanisms;
- ensure **fair, independent and expert decision-making** – the draft texts could both be amended to:
 - add direct linkages with existing MEAs, including requirements to engage relevant bodies or expertise in settling relevant disputes under the agreement;
 - provide more precise wording to guarantee the independence of experts engaged in dispute processes;
- establish the potential for **effective and dissuasive remedies** – the draft texts could both be amended to:
 - include direct references to legal remedies and sanctions available to complainants;
 - ensure that the recommendations of dispute mechanisms are binding upon the partners; and
 - apply the full horizontal DSM, in addition to chapter-specific measures, to the trade and environment chapters.

For more information, please contact: Hatti Owens, UK Environment Lawyer, ClientEarth e: howens@clientearth.org

Endnotes

¹ European Commission, Draft text of the Agreement on the New Partnership with the United Kingdom (18 March 2020) Article LPFS.1.1(1) <https://bit.ly/38yBjUs>.

² UK Government, Draft EU-UK Comprehensive Free Trade Agreement (CFTA) (19 May 2020) Article 28.2 <https://bit.ly/3gxpNv2>.

³ More specifically, Part Two (Economy and Trade), Title III (Level Playing Field and Sustainability).

⁴ Established in Part Five (Institutional and Horizontal Provisions), Title II (Dispute Settlement).

⁵ It relies on a system of consultation; and review, reporting and recommendation by a panel of experts. Whilst certain elements of the EU Horizontal DSM are said to apply mutatis mutandis to the Section 8 DRM, the EU's apparent intention is that this application extends to procedural aspects only. For instance, the more robust remedies established in the EU Horizontal DSM are not intended to form part of the Section 8 DRM.

⁶ Part Two (Economy and Trade), Title V (Fisheries), Article FISH.13.

⁷ Article 33.20.1.

⁸ Article 33.15.8.

⁹ Articles 28.13, 28.14 and 28.15.1.

¹⁰ Orbie, J., D. Martens and L. Van den Putte, "Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation" (2016) <https://bit.ly/3e5Pfq2>.

¹¹ Cross, C., "Exemplary elements for the effective anchoring of climate and environmental protection in EU trade agreements" (January 2019).

¹² P.-T. Stoll, H. Gött, and P. Abel, Model Labour Chapter for EU Trade Agreements (2017) <https://bit.ly/31OCIVm>.

¹³ Cross, C., "Exemplary elements for the effective anchoring of climate and environmental protection in EU trade agreements" (January 2019).

¹⁴ Dr Sabaa A. Khan (International Institute for Sustainable Development), 'Environmental and Public Interest Considerations in NAFTA Renegotiation' (2017).

¹⁵ Office of the United Nations High Commissioner for Human Rights, '23 Frequently Asked Questions about Treaty Body Complaints Procedures' <https://bit.ly/2AxRKDF>.

- ¹⁶ Cross, C., “Exemplary elements for the effective anchoring of climate and environmental protection in EU trade agreements” (January 2019).
- ¹⁷ Articles INST.6, INST.7 and INST.8.
- ¹⁸ European Parliament, Recommendations on the negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland <https://bit.ly/2029oCQ>.
- ¹⁹ At paragraph 68.
- ²⁰ See, for instance, Articles LPFS.2.32 and 2.37.
- ²¹ Article 28.12.5.
- ²² Article 26.5.
- ²³ Article 26.4.4(b).
- ²⁴ Article 28.13.4.
- ²⁵ Article 26.5.2.
- ²⁶ Article 26.4.4(b).
- ²⁷ Article 26.4.4(a).
- ²⁸ Article 28.7.3.
- ²⁹ Article 28.6.
- ³⁰ As set out in the UN Basic Principles on the Independence of the Judiciary.
- ³¹ Article INST.28(2).
- ³² Article LPFS.2.52(3).
- ³³ It is unclear to what extent the *mutatis mutandis* application of Article INST.28 actually applies to the Section 8 LPFS panel of experts (Article LPFS.2.52(10)).
- ³⁴ Article INST.28(1).
- ³⁵ Article LPFS.2.51(3).
- ³⁶ Article LPFS.2.51(2).
- ³⁷ Article INST.11.
- ³⁸ Article LPFS.2.52(5).
- ³⁹ Article 28.14.7.
- ⁴⁰ Article 28.14.7.
- ⁴¹ Article 28.14.9.
- ⁴² Ankersmit, L., E. Partiti, ‘Alternatives for the ‘Raw materials and Energy Chapters’ in EU trade agreements. An inclusive approach’ (2020).
- ⁴³ Article INST.20.
- ⁴⁴ For example, as to which elements of the EU Horizontal DSM apply to the Section 8 DRM – see Article LPFS.2.52(10).
- ⁴⁵ Articles LPFS.2.52(7) and (9).
- ⁴⁶ See note 18; at paragraph 164.
- ⁴⁷ Article 33.20.
- ⁴⁸ Article 33.22.
- ⁴⁹ Article 28.14.11.
- ⁵⁰ James Harrison et al., ‘Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission’s Reform Agenda’ (2018).

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